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IN THE

Supreme Court of the United States

October Term, 1973

Supreme Court, U. S.
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THE TRAVELERS INSURANCE COMPANY,
Petitioner,

v.

BLUE CROSS OF WESTERN PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Constitutional Provisions and Statutes Involved	5
Statement	7
Reasons for Granting the Writ	11
(1) The McCarran Act	12
(2) Sherman Act — Section 1	17
(3) Sherman Act — Section 2	22
(4) The Fourteenth Amendment	25
Conclusion	27
Appendix A	1a
Appendix B	12a
Appendix C	27a
Appendix D	33a

TABLE OF CASES

Allstate Ins. Co. v. Lanier, 361 F. 2d 870 (4th Cir. 1966), *cert. denied*, 385 U.S. 930 (1966)	14
American Federation of Tobacco Growers, Inc. v. Neal, 183 F. 2d 869, 873 (4th Cir. 1950)	21
American Hospital and Life Ins. Co. v. Federal Trade Commission, 243 F. 2d 719 (5th Cir. 1957)	14
American Tobacco Co. v. United States, 328 U. S. 781 (1946)	23
Atlantic & Pacific Ins. Co. v. Combined Ins. Co., 312 F. 2d 513, 515 (10th Cir. 1962)	17
Board of Trade of the City of Chicago v. United States, 246 U. S. 231, 238 (1918)	17, 18
Carnation Co. v. Pacific Westbound Conference, 383 U. S. 213 (1966)	16

Table of Cases.

PAGE

Federal Trade Commission v. National Casualty Co., 357 U. S. 560 (1958) 12, 14

Federal Trade Commission v. Travelers Health Assn., 362 U. S. 293 (1960) 12, 14

Hartford Steam Boiler Inspection & Insurance Co. v. Harrison, 301 U.S. 459 (1937) 26

International Salt Co., Inc. v. United States, 322 U. S. 392, 394-96 (1947) 21

Mayflower Farms, Inc. v. Ten Eyck, 297 U. S. 266 (1936) 26

Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299 (D. Mass. 1957), aff'd mem. 242 F. 2d 758 (1st Cir. 1957), *cert. denied*, 355 U. S. 828 (1957) 15

Morey v. Doud, 354 U. S. 457 (1957) 26

North Little Rock Transportation Co. v. Casualty Reciprocal Exchange, 181 F. 2d 174 (8th Cir. 1950) 14

Northern Pacific Railway Co. v. United States, 356 U. S. 1, 4-5 (1958) 17

Northern Securities Co. v. United States, 193 U. S. 197 (1904) 17

Professional and Business Men's Life Ins. Co. v. Bankers Life Co., 163 F. Supp. 274 (D. Mont. 1958) 14

Sears, Roebuck & Co. v. Allstates Life Ins. Co., 246 F. 2d 161, 172 (5th Cir. 1957) 16

Sanborn v. Palm, 336 F. Supp. 222 (S. D. Tex. 1971) 14

Silver v. New York Stock Exchange, 373 U. S. 341, 357-61 (1963) 16

Standard Oil Co. of N. J. v. United States, 221 U. S. 1, 60, 66 (1911) 17

Telex Corp. v. International Business Machines, ATRR, Sept. 25, 1973, pp. A-1, D-1 (D. Okla. 1973) 25

Table of Cases.

PAGE

United States v. American Tobacco Co., 221 U. S. 106 (1911) 17

United States v. Aluminum Co. of America, 377 U. S. 271 (1964) 23

United States v. Borden Co., 308 U. S. 188, 196-202 (1939) 15

United States v. Chicago Title & Trust Co., 242 F. Supp. 56 (N. D. Ill. 1965) 14

United States v. E. I. duPont de Nemours & Co., 351 U. S. 377, 380, 389-91 (1956) 23

United States v. New York Great Atlantic & Pacific Tea Co., 173 F. 2d 79, 82 (7th Cir. 1949) 21

United States v. Philadelphia National Bank, 374 U. S. 321, 368 (1963) 15

United States v. Radio Corporation of America, 358 U. S. 334, 339-46 (1959) 16

United States v. Trans-Missouri Freight Assn., 166 U. S. 290, 312 (1897) 17

Zachman v. Erwin, 186 F. Supp. 691, 694 (S. D. Tex. 1960) 16

STATUTES

Clayton Act, 15 U.S.C. § 26 8

McCarran Act, 15 U.S.C. §§ 1011-1015 .....3-4, 5, 12-17

Nonprofit Hospital Plan Act, 40 P.S. §§ 1401-1409 .....12, 16

Sherman Act, 15 U.S.C. §§ 1, 2 ..... 3-6, 7-8, 17-25

28 U.S.C. § 1254 (1) 3

40 Pa. St. §§ 6101-6127 12

CONSTITUTION

Amendment 14 .....6, 25-27

NO. ....

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v.

BLUE CROSS OF WESTERN PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, The Travelers Insurance Company ("Travelers") prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit decided on July 10, 1973.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 481 F. 2d 80 and is attached hereto as Appendix A, infra, pp. 1a-11a. The final opinion of the United States District Court for the Western District of Pennsylvania is reported at 1972 Trade Cases ¶ 73,811 and is attached hereto as Appendix B, infra, pp. 12a-26a. Pretrial opinions of the District Court in this case denying two motions for summary judgment filed on behalf of the Defendant

are reported at 298 F. Supp. 1109 (Appendix C, infra, pp. 27a-32a and 306 F. Supp. 219 (Appendix D, infra, pp. 33a-35a).

JURISDICTION

The District Court rendered its judgment on January 6, 1972. The judgment of the Court of Appeals affirming the judgment of the District Court was entered on July 10, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The following are important questions of Federal law which have not been, but should be, decided by this Court, and which should move this Court to grant this petition:

1. The McCarran Act exempts the "business of insurance" from the application of the Federal antitrust laws to the extent that such business is regulated by state law. Blue Cross has been found to be in the business of insurance for the purposes of the McCarran Act, and the contract between Blue Cross and Western Pennsylvania hospitals, which is the center of contention in this case because it provides for a discount allowed only to Blue Cross, was "approved" by the Pennsylvania insurance commissioner. However, no state statute regulates the competitive behavior of Blue Cross or the competitive effect of the contract. Because the contract is subject to the general supervision of the insurance commissioner, the lower courts found the contract to be immune from the Sherman Act. The effect of the

rulings of the courts below is that all insurance companies (life, accident, health, etc.) in each state are free to engage in territorial allocation, mergers, price-fixing, monopolization, etc., if there is general supervision of insurance in that state under a state statute, even though the state statute is silent respecting these types of conduct. The scope of the McCarran Act exception to the Sherman Act has never been ruled upon by this Court on this point, and the crucial question is what type and extent of state regulation is required to produce exemption from the Sherman Act?

2. Section 1 of the Sherman Act prohibits contracts in "unreasonable restraint of trade." The courts below found the contract between Blue Cross and the hospitals to be "reasonable" because Blue Cross was out to "get the best deal possible" and this arrangement permitted Blue Cross to pass "along the saving thus realized to consumers." The District Court thought the contract to be "reasonable" from the standpoint of the parties who signed it. Is this the proper test of "reasonableness", or is the proper test whether the effect on competition is reasonable, without regard to the benefits to the parties or to a segment of the public?

3. The lower courts found that Blue Cross could not be guilty of monopolization under Section 2 of the Sherman Act because its monopoly power had been "thrust upon" it. Blue Cross and Travelers offer the same product in the same marketplace. The basic difference is the "guidelines" of the state insurance commissioner which require Blue Cross to reimburse hospitals at amounts less than the hospitals charge others. This results in Blue Cross being able to underbid its competitors. Thereby it has obtained its monopoly posi-

tion. When monopoly power results not from the "superior skill, foresight and industry" of the defendant, but from a procedure dictated to it from a state agency — and denied its competitors — is the monopoly power thus obtained "thrust upon" the defendant in the meaning of the antitrust laws?

4. Blue Cross has obtained a "superior competitive position" as a result of its contract with hospitals, which has placed its competitors at a substantial price disadvantage. The lower courts have held Blue Cross to be exempt from the antitrust laws because the contract which created its competitive advantage was approved by the state insurance commissioner under a Pennsylvania statute. Does this action by the state insurance commissioner, whereby Blue Cross has obtained its substantial competitive advantage, and which does not pertain to Blue Cross competitors, deny Blue Cross competitors due process and equal protection of the laws under the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. §§ 1 and 2) provide in pertinent part:

> "1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *.
>
> "2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

Section 2(b) and 3(b) of the McCarran Act (59 Stat. 33, 15 U.S.C. §§ 1012(b) and 1013(b)) provide in pertinent part:

> "2(b). No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or impose a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided* that after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the

extent that such business is not regulated by State law."

"3(b). Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

Section 1 of Amendment 14 to the Constitution of the United States provides in pertinent part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Travelers and Blue Cross of Western Pennsylvania ("Blue Cross") compete in the hospitalization insurance market in Western Pennsylvania. In the course of this competition, each offers coverage for hospital services at premiums which reflect the amounts which they must pay the hospitals for these services.

The hospitals of Western Pennsylvania charge for services performed for both inpatients and outpatients under a dual pricing structure. Patients who pay cash for services or are insured by commercial hospitalization carriers, such as Travelers, are billed by the hospitals according to a schedule of charges fixed by the board of directors of the hospital. If the insurance benefits have been assigned to the hospital by the patient, the insurance company pays the hospital directly. Patients who have Blue Cross coverage do not make direct payments to the hospitals, except for items not covered by their Blue Cross contract, but instead Blue Cross makes payments on their behalf to the hospitals at a special reduced rate. This special reduced rate ("the discount"), is on an average, 14% below the hospitals' regularly established charges for those services, and is a feature of the standard contract between Blue Cross and each of the hospitals of Western Pennsylvania. (Appendix B, pp. 12a-14a).

Because of this discrimination by the hospitals in favor of Blue Cross, it is virtually impossible for Travelers and other commercial insurance companies to compete with Blue Cross in the sale of hospitalization coverage in Western Pennsylvania.

Statement.

Travelers brings this action on the grounds that the standard contract is a contract in unreasonable restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, that the contract which provides for the Blue Cross discount has resulted in Blue Cross's obtaining a monopoly position in the market of providing hospitalization coverage in Western Pennsylvania, and that by soliciting the discount from the hospitals and using the discount as a competitive weapon, Blue Cross has engaged in monopolization and attempt to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

Travelers seeks only injunctive relief under 15 U.S.C. § 26. It does not seek monetary damages.

The fundamental facts found by the District Court are as follows:

1. The relevant market in which the parties compete is the sale of hospitalization insurance in 29 counties of Western Pennsylvania.

2. "[T]he methods employed and the plan administered by Blue Cross . . . do result in a superior competitive position on the part of Blue Cross."*

3. "Blue Cross subscribers and their covered dependents number more than half of the entire population of the relevant market area." In the period 1965-1969, Blue Cross patients "were the recipients of 62% of all hospital days of service to Western Pennsylvania patients covered by hospitalization insurance." The re-

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*Quotations are from the opinion of the District Court, which is set forth in full in Appendix B.

maining 38% was divided among Travelers and approximately 300 other commercial carriers.

4. As to how Blue Cross acquired its "superior competitive position," the District Court found that the hospitals "charge policyholders of Travelers and other commercial carriers an average of 14% more for their services than they accept as full payment from Blue Cross." Blue Cross is therefore able to quote lower hospitalization insurance premiums than Travelers and the other commercial carriers, placing the commercial carriers at "a substantial price disadvantage" in their "quest for hospitalization insurance business."

5. In its advertising, Blue Cross features "the ability of its subscribers to acquire hospital services at rates lower than those charged by hospitals to other patients."

6. Though the hospitals receive less than charges for providing services to Blue Cross patients, they receive even *less* from Blue Cross if they fail to sign the standard contract—"those hospitals which do not enter the Blue Cross contract are paid [by Blue Cross] a per diem rate for their services to Blue Cross subscribers which is substantially less than their cost of service. Therefore, they sign the contract for their own economic advantage."

7. Finally, the District Court found that the hospitals were cornered into accepting the discount by "guidelines" transmitted by the Pennsylvania Insurance Department.

The District Court opinion thus describes a relevant market where competition is significantly nullified by

the overwhelming advantages of the dominant participant, Blue Cross. Blue Cross has 62% of the market, according to the measure adopted by the District Court, with the remaining portion fragmented among 300 commercial competitors. Further, Blue Cross has a 14% price advantage over its competitors. Nonetheless, the District Court held and the Court of Appeals affirmed that Blue Cross's competitors have no recourse under the Federal antitrust laws because the contract on which this litigation is predicated is subject to approval by the Pennsylvania insurance commissioner. Travelers disagrees and seeks review by this Court.

REASONS FOR GRANTING THE WRIT

The questions posed by this case are of vital interest to the whole of the United States and constitute important questions of Federal law which have not been, but should be, settled by this Court.

In the balance here is the question of whether private insurance carriers will remain in the field of hospitalization insurance in competition with Blue Cross plans in Western Pennsylvania and throughout the nation. If Blue Cross's competitive behavior is not limited by either the Federal antitrust laws or state regulation, and if it therefore may legally engage in monopolistic practices which exclude, restrict and prejudice competition by the commercial insurance carriers, then the many private insurance companies which have tried to offer hospitalization policies in competition with Blue Cross will have to leave the field, and Blue Cross will become the sole provider of private hospitalization insurance in the United States.

This case poses four important questions of Federal law which have never been decided by this Court, on the basis of which we urge this Court to exercise its discretion under Rule 19 to grant certiorari in this case.

Reasons for Granting the Writ.

(1) The McCarran Act

Since enactment of the McCarran Act in 1945, there have been only two opinions of this Court interpreting limited questions involving the exemption provided by the McCarran Act to the antitrust laws of the United States.* This Court has not heretofore had an occasion to define the breadth of the McCarran exemption. The decided cases leave unanswered the question of what kind and what extent of insurance regulation by a state is required to oust Federal jurisdiction over charges of restraint of trade, monopolization and attempts to monopolize. Nor are the limits clear for what the Court of Appeals has termed "garden variety antitrust violations," such as territorial restrictions, price-fixing, tie-in arrangements and the like. (Appendix A, p. 8a)

The holding of the courts below is that approval by the Pennsylvania insurance commissioner of the Blue Cross hospital contract and the general supervision of Blue Cross by the insurance commissioner under the Pennsylvania Nonprofit Hospital Plan Act** is sufficient to exempt Blue Cross and the Blue Cross hospital contract from scrutiny under the antitrust laws. The lower courts so held even though the state statute under which the insurance commissioner operates, the only

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*Federal Trade Commission v. National Casualty Co., 357 U.S. 560 (1958) and Federal Trade Commission v. Travelers Health Assn., 362 U.S. 293 (1960).

**The Nonprofit Hospital Plan Act, 40 P.S. §§ 1401-1409, originally enacted in 1937, was reenacted in 1972 as part of the Pennsylvania Consolidated Statutes as 40 Pa. St. §§6101-6127. The reenactment involved no statutory changes which are material to this case.

state statute applicable to Blue Cross, is entirely silent on the subject of contracts in restraint of trade, monopolization or attempts to monopolize. The lower courts so held notwithstanding also the fact that Pennsylvania statutes provide no procedure through which an injured competitor may seek relief.

If this is indeed the proper interpretation of the McCarran Act, then all insurance companies (including life, accident, casualty, health, etc.) are exempt from the Sherman Act prohibitions in any state in which there is a statute providing general regulation of insurance companies, even though the state statute is completely silent with respect to antitrust matters.

The McCarran Act, though it authorizes the states to tax and regulate the interstate business of insurance, provides that "the Sherman Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 15 U.S.C. §1012(b). Though Pennsylvania has a statute which regulates Blue Cross and calls for Insurance Department approval of the standard contract here under examination, Pennsylvania has no statute which goes to the extent of regulating the competitive behavior of Blue Cross, about which Travelers complains. The question posed by the McCarran Act is not *whether* a state has regulated the business of insurance, but the *extent to which* the state has regulated that business. The District Court and the Court of Appeals have adopted the view, inconsistent with holdings in other circuits, that because Blue Cross is regulated by the Insurance Department for *some purposes,* it is immune from the application of the Sherman Act for *all* purposes. The Supreme Court has this present opportunity to clarify the

McCarran Act by defining the type and extent of state regulation required to produce immunity.

The cases in other circuits on point are clear and unanimous. When an antitrust charge is brought against an insurance company, the initial question for the court is whether the state has a statute regulating the anticompetitive conduct which is the subject matter of the charge. When the charge is that an insurance rating bureau is engaged in illegal price fixing, the question is whether the state has a statute which regulates the manner in which prices are fixed by the bureau. *North Little Rock Transportation Co. v. Casualty Reciprocal Exchange,* 181 F. 2d 174 (8th Cir. 1950); *Allstate Ins. Co. v. Lanier,* 361 F. 2d 870 (4th Cir. 1966), *cert. denied,* 385 U.S. 930 (1966). When the charge is unfair advertising in violation of the Federal Trade Commission Act, the question is whether the state has a statute which regulates advertising in the manner of the FTC Act. *Federal Trade Commission v. National Casualty Co.,* 357 U.S. 560 (1958); *American Hospital & Life Ins. Co. v. Federal Trade Commission,* 234 F. 2d 179 (5th Cir. 1957); *Federal Trade Commission v. Travelers Health Assn.,* 362 U.S. 293 (1960). When the charge is illegal merger under Section 7 of the Clayton Act, the question is whether the state has a statute which regulates mergers of insurance companies. *United States v. Chicago Title & Trust Co.,* 242 F. Supp. 56 (N.D. Ill. 1965). When the charge is violation of the Sherman Act, the question is whether the state has a statute which prohibits insurance companies from engaging in conspiracy and monopolization *Professional and Business Men's Life Ins. Co. v. Bankers Life Co.,* 163 F. Supp. 274 (D. Mont. 1958); *Sanborn v. Palm,* 336

F. Supp. 222 (S. D. Tex. 1971). When the charge is conspiracy to exclude a particular insurance bidder, the question is whether the state has a statute which regulates competition in the bidding process. *Miley v. John Hancock Mut. Life Ins. Co.*, 148 F. Supp. 299 (D. Mass. 1957), *aff'd*, 242 F. 2d 758 (1st Cir. 1957), *cert. denied* 355 U.S. 828 (1957).

Thus, with the charge in this case being that Blue Cross's market dominance, its substantial price advantage, and its use of that advantage against competitors constitute a violation of the Sherman Act, the question is whether Pennsylvania has a statute regulating the effects of the Blue Cross hospital contract and market dominance on competition. The answer to this question is clear—Pennsylvania has no such statute.

In light of the above cases, the District Court and the Court of Appeals were clearly in conflict with other circuits in concluding that *any* regulation by the state, whether or not it relates to competitive behavior, is sufficient to immunize an insurance entity from the Federal antitrust laws. To the contrary, the state regulation must be addressed to the competitive area covered by the applicable Federal antitrust law in order to produce immunity under the McCarran Act.

Furthermore, the mere fact that an entity is "subject to a high degree of governmental regulation" for other purposes does not exempt it from the Federal antitrust laws. *United States v. Philadelphia National Bank*, 374 U.S. 321, 368 (1963); *United States v. Borden Co.*, 308 U.S. 188, 196-202 (1939). Only if the regulating authority is specifically vested with the *duty* of regulating competitive behavior does its regulation supersede

the Federal antitrust laws. *United States v. Radio Corp. of America,* 358 U.S. 334, 339-46 (1959); *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213 (1966). In *Silver v. New York Stock Exchange,* 373 U.S. 341, 357-61 (1963), the Supreme Court held that the antitrust laws apply to the New York Stock Exchange, in spite of the fact that it is regulated by the Securities & Exchange Commission:

> "There is nothing built into the [SEC] regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends." 373 U.S. at 358.

The Pennsylvania statute regulating Blue Cross does not pass this test. The trial court found that "the Pennsylvania Nonprofit Hospital Plan Act is completely silent in matters that have to do with restraint of trade." 298 F. Supp. at 1112. Because there is no Pennsylvania statute which "performs the antitrust function," Blue Cross is subject to the antitrust laws.

An additional reason why the Nonprofit Hospital Plan Act should not qualify under the McCarran Act to give Blue Cross immunity from the Federal antitrust laws is that it fails to provide a private right of action for injury suffered as a result of Blue Cross's anticompetitive activities. In order for a state regulatory statute to satisfy the requirements of the McCarran Act, it must give a private right of action to persons injured by the anticompetitive activities of an insurance company. *Zachman v. Erwin,* 186 F. Supp. 691, 694 (S.D. Tex. 1960); *Sears, Roebuck & Co. v. Allstate Life Ins.*

Co., 246 F. 2d 161, 172 (5th Cir. 1957); *Atlantic & Pacific Ins. Co. v. Combined Ins. Co.*, 312 F. 2d 513-515 (10th Cir. 1962).

(2) Sherman Act — Section 1

The significant question of Federal law involved here is what standard of "reasonableness" is to be applied when judging the validity of a contract in restraint of trade.

Heretofore the cases have looked at the reasonableness of the restraint of trade resulting from the contract in question in terms of whether it served some purpose which would itself further competition rather than limit it. *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231 (1918). The District Court and the Court of Appeals failed to look to the reasonableness of the restraint on competition but rather judged the contract to be reasonable because the hospitals had a good reason for entering into the Blue Cross contract and because a good social purpose was served by the contract, which benefited a substantial segment of the population. The lower courts misapplied the "rule of reason" by ignoring the effect of the contract on competition.

Since the earliest cases arising under the Sherman Act, the Supreme Court has given broad meaning to the condemnation of every restraining contract. *Northern Securities Co. v. United States*, 193 U.S. 197 (1904); *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 312 (1897). Only if a restraint is reasonable can a contract be upheld. *Standard Oil Co. of N. J. v. United States*, 221 U.S. 1, 60, 66 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4-5

(1958). The District Court correctly found facts that lead to the conclusion that the Blue Cross hospital contract unreasonably restrains trade. It found that "the evidence on the whole predominates in favor of Travelers that the methods employed . . . by Blue Cross resulted in a superior competitive position." (Appendix B, p. 22a) However, the District Court misconceived the purpose of the antitrust laws and, though it made no specific finding on the subject of the reasonableness of the contract, it concluded that the contract is not in violation of Section 1 of the Sherman Act because it was good for a sizeable group of people.

The District Court found that the contract's effect upon competition was "substantial" and "detrimental" to the ability of commercial carriers to compete effectively. (Appendix B, pp. 13a, 22a) Its findings describe a market where free competition is hampered by the unique capacity of one dominant competitor to obtain a special cost advantage. On the basis of these findings alone, one must conclude that the Blue Cross contract unreasonably restrains interstate commerce in violation of Section 1 of the Sherman Act.

The legal test of "reasonableness" was generally stated in *Board of Trade of the City of Chicago v. United States,* 246 U.S. 231, 238 (1918):

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."

Though the District Court failed to apply this relevant legal test, it acknowledged that the contract does

not "merely regulate" or "promote competition"; it found that the contract has a suppressive effect upon competition. On the basis of the trial record, it could hardly have found otherwise. The Court of Appeals found that Blue Cross, in using its superior competitive position in negotiating with hospitals, was simply trying to get "the best deal possible" and on this basis found that the contract was reasonable. Neither the District Court nor the Court of Appeals considered reasonableness from the standpoint of the effect of the restraint on competition.

The competitive restraint resulting from Blue Cross's contractual discount takes at least three forms. First, Blue Cross is able to take over groups which had formerly obtained their hospitalization coverage from Travelers or another commercial carrier. For example, as of January 1, 1971, United States Steel Corporation changed the hospitalization coverage on a group of 24,000 salaried employees from a commercial carrier to Blue Cross because of the discount. This change resulted in a loss to the carrier of some $7 million in annual premiums. (120a, 174a-176a) A second form of restraint is that, in competitive bidding situations for new groups, Blue Cross is able to obtain the hospitalization insurance coverage due to its discount. (68a-69a, 109a-111a, 115a, 126a-127a, 135a-136a, 153a-154a, 175a-176a, 885a) Third, Travelers and other commercial insurance companies are often not even given the opportunity to bid on group hospitalization coverage because the group or its broker, knowing of the Blue Cross hospital discount and resulting price advantage, has simply considered it a waste of time to solicit bids from com-

mercial insurance companies. (61a-65a, 88a-90a, 96a-97a, 862a, 885a, 918a-919a; DX-251)

The result of the restraint is visible in the growth of Blue Cross. Blue Cross's sales of hospitalization insurance have greatly increased over the past twenty years. In 1950, Blue Cross had 1,606,848 participants; in 1960, it had 1,919,237 participants; and in 1970, it had 2,263,433 participants. (PX-1) In 1950, its annual premiums were $17,172,337; in 1960, its annual premiums had grown to $68,959,241; in 1970, its annual premiums were $170,780,270. In 1948, Blue Cross insured 31% of the population of Western Pennsylvania with hospitalization coverage; in 1970, it insured 51% of the population of Western Pennsylvania. (PX-5)

The growth of Blue Cross of Western Pennsylvania has surpassed the growth of Blue Cross plans in other parts of the country where the discount is either less than 14% or nonexistent. In 1970, all Blue Cross plans together insured 35% of the population of the United States, while Blue Cross of Western Pennsylvania insured 51% of the entire population of this area. (PX-1) The substantial Blue Cross discount is clearly a factor contributing to this growth.

The other side of this picture of Blue Cross's growth is the exclusion of Travelers and other commercial insurance companies from a substantial part of the market. Because of Blue Cross's greater discount in Western Pennsylvania, the sales offices of Travelers and other commercial carriers in the area do not have the success which they achieve in other parts of the country. (96a, 122a-123a) Though Travelers has been selling group hospitalization coverage since 1934 and

has been offering full service benefits since 1951, it has only an infinitesimal market share to show for these efforts. (PX-9) Its salesmen and those of other carriers are well enough able to sell other types of individual and group insurance coverage; it is only in the area of hospitalization insurance, where it must compete against the Blue Cross discount, that it has been substantially excluded. (49a, 109a-110a, 122a, 126a-127a) For the dominant competitor to exclude other competitors from their expectable market share through the use of a unique contractual price advantage, obtained due to its size and power, is clearly an illegal restraint. *International Salt Co., Inc. v. United States,* 322 U.S. 393, 394-96 (1947); *United States v. New York Great Atlantic & Pacific Tea Co.,* 173 F. 2d 79, 82 (7th Cir. 1949); *American Federation of Tobacco Growers, Inc. v. Neal,* 182 F. 2d 869, 873 (4th Cir. 1950).

There is no reasonable justification for the discount. In defending its discount, Blue Cross does not argue that its discount is "cost justified." The amount of the discount at any one hospital is not related to an amount which the hospital might save as a result of bulk billing or other administrative advantage. No one testifying on behalf of Blue Cross maintained that the 14% of the discount is ever related to identifiable savings which the hospital enjoys due to its relationship with Blue Cross.

Because the Blue Cross contract results directly in an unreasonable restraint of trade, the contract is in violation of Section 1 of the Sherman Act.

(3) Sherman Act — Section 2

The significant question of Federal law involved here is whether the monopoly power of Blue Cross, which the District Court found restricted competition from Travelers and other commercial carriers, is safe from attack under Section 2 of the Sherman Act because this monopoly position was "thrust upon" Blue Cross. The "thrust upon" defense to a charge of monopolization is a recognized defense, but the unique and significant feature here is that Blue Cross's position of monopoly power came about as a result of operating within the "guidelines" imposed by the Pennsylvania insurance commissioner. The insurance commissioner, so the District Court found, directed Blue Cross to pay only certain of each hospital's audited costs for Blue Cross patients, rather than the hospital's full costs or established charges. This leads to what the District Court found was a 14% discount in favor of Blue Cross, which in turn leads to a lower premium charge by Blue Cross, from which followed "public acceptance" and increased enrollment.

Heretofore the rulings of this Court have been that the "thrust upon" defense is that resulting from the "superior skill, foresight and industry" of the defendant, but here the "thrust upon" defense is based upon directives from the state insurance commissioner which result in a price discrimination by the hospitals between two classes of patients, i.e., Blue Cross patients and insurance company patients. If success is thus "thrust upon" Blue Cross by a directive of the insurance commissioner, does that give Blue Cross a defense to a charge of monopolization under Section 2 of the Sherman Act?

The salient economic fact found by the District Court is that Blue Cross is the dominant competitor. Blue Cross has a 62% share of the relevant market, it has a substantial competitive advantage over the other market participants in that it alone enjoys a 14% discount, and its 300 competitors divide the remaining 38% of the market, with none of them having a significant share of the market. (Appendix B, p. 13a)

From these facts, one must conclude that Blue Cross has monopoly power. It has successfully excluded meaningful competition. It uses its cost advantage to underbid its competitors and therefore it controls prices in the market. Its monopoly unreasonably restricts competition. *Cf. United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377, 380, 389-91 (1956); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964).

The size and power of Blue Cross affect its relationships with the hospitals and with its competitors. Blue Cross's size is inevitably a consideration leading the hospitals to sign the contract which provides for a discount. If Blue Cross covered only 5,000 people in Western Pennsylvania — rather than over 2,000,000, half the population — it is doubtful that any hospital would sign the approved contract giving Blue Cross a 14% discount.

Having obtained the discount due to its size, Blue Cross then uses the discount to grow larger. Blue Cross is able to bid lower premiums and to tell purchasers of its special hospital arrangement. (Appendix B, p. 13a) It thus intentionally uses the discount as a competitive weapon.

Furthermore, Blue Cross acts with the intent of driving its commercial competitors from the market. It argues that competition between commercial insurance companies and Blue Cross is "inappropriate," "unwise," "illogical,'' "wasteful," and "a destructive element." (PX-35, 39, 41) It maintains that the nation's whole health care delivery system will be "in jeopardy" if commercial carriers are permitted to remain in the market, and it tries to enlist the aid of civic groups and community leaders in its efforts to enroll the entire population of Western Pennsylvania. (PX-37, 38) If it were successful, it would stand completely without competitive challenge. Possessing monopoly power, and intentionally employing that monopoly power to exclude competitors in the relevant market, Blue Cross engages in monopolization and attempts to monopolize in violation of Section 2 of the Sherman Act.

Purchasers of group hospitalization coverage for large employment groups testified that Blue Cross's product and services are not superior, except for their lower price due to the discount. Such purchasers choose an insurance carrier strictly on the basis of price. In their view, the hospitalization coverage and services offered by Travelers and other commercial carriers are virtually identical to the products and services of Blue Cross. (94a-95a, 98a, 107a, 132a-133a, 139a, 142a, 147a, 152a-156a, 159a-160a, 172a, 888a, 947a) In attempting to secure the business of employment groups, Blue Cross uses its hospital discount as the central feature of its sales pitch. (PX-96, 154, 154b, 207, 207b, 208-210, 212)

Blue Cross is large and it is able to use its size to become larger. Its competitors, though many of them are sizeable, aggressive corporations, and are successful competitors in other markets — each have only a toehold in the hospitalization insurance market in Western

Pennsylvania. Because of its size, Blue Cross obtains a discount from the hospital. It then uses the discount as a competitive weapon, underbidding its commercial competitors. It thus controls prices and excludes competition — the classical behavior of a monopolizing competitor — in violation of Section 2 of the Sherman Act.*

(4) The Fourteenth Amendment

If it is the law that success due to a price discrimination "thrust upon" a defendant by a state agency is a defense to a charge of monopolization, then the issue is presented in this case whether such state-directed price discrimination is a denial of due process and equal protection of the laws under the Fourteenth Amendment.

The Fourteenth Amendment to the United States Constitution forbids the states to deny "due process" and "equal protection of the laws." The District Court found that the Blue Cross discount results from features in the hospital contract which are required by the Pennsylvania Insurance Department. The Opinion of the Court of Appeals refers to "guidelines" issued by the Insurance Department. (Appendix A, p. 6a) These guidelines as described in the Opinion of the Court of Appeals, developed by the Insurance Department without any hearing or opportunity being given to Travelers to object, consisted of items of costs for which Blue Cross was not to reimburse the hospitals. The hospitals are then forced to turn to cash paying patients and commercial insurance patients in order to make up for the failure of Blue Cross to bear its fair share of the cost bur-

*In the very recent decision of Telex Corp. v. International Business Machines (A.T.R.R., Sept. 25, 1973, pp. A-1, D-1) the District Court once again held that the "thrust upon" defense must result from superior products or business acumen.

den. Thus, the guidelines discriminate in favor of Blue Cross and against its commercial competitors and deny to those competitors the "equal protection of the laws."

The Supreme Court has repeatedly held that a state's discriminatory grant of a competitive advantage to one competitor is a violation of the Fourteenth Amendment. *Mayflower Farms, Inc. v. Ten Eyck,* 297 U.S. 266 (1936); *Hartford Steam Boiler Inspection & Insurance Co. v. Harrison,* 301 U.S. 459 (1937); *Morey v. Doud,* 354 U.S. 457 (1957).

There is no rational basis for the discrimination in favor of Blue Cross expressed through the Insurance Department "guidelines." The guidelines result in a system under which Blue Cross subscribers pay for hospital care on a discounted basis, while commercially insured and other cash paying patients are required to pay full charges for the same services. Blue Cross subscribers are freed from sharing in the burden of covering the hospitals' cost of providing care to indigent and defaulting patients and reserves for capital improvement, while commercially insured and cash paying patients pay charges which include a factor reflecting this burden. Due to the guidelines, hospitals are required to discriminate among their patients on the basis of whether they are Blue Cross subscribers or charge paying patients—a distinction for which there is no rational justification. Because the guidelines result in a denial of equal protection of the laws, without a rational basis for discrimination, and because the guidelines were developed without the holding of any bearing at which due process could be afforded to Travelers, the guidelines constitute state action in violation of the Fourteenth Amendment.

CONCLUSION

If this case involved steel, aluminum, milk, or electrical equipment, a violation of the Sherman Act would be clear and unchallenged. One competitor in the market has used a unique price advantage, obtained due to its size and power, to gain market dominance and to exclude meaningful competition. The question to be answered by this Court is whether the normal restraints on competitive behavior which are set forth in the antitrust laws are to be set aside simply because the defendant in this case is Blue Cross and the industry involved is the business of insurance. Health care and particularly hospital costs are major items of public concern, yet by the finding of the District Court, affirmed by the Court of Appeals, the private insurance carriers are clearly handicapped and under a distinct disadvantage in competing with Blue Cross. Whether this is sanctioned by the law is an important question of national concern which has not been, but should be, settled by this Court. This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

(Filed July 10, 1973)

VAN DUSEN, Circuit Judge.

Travelers Insurance Company appeals from the January 6, 1972, district court order dismissing its complaint against Blue Cross of Western Pennsylvania, which order was entered after a trial to the court. Travelers had charged Blue Cross with restraining trade, in violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1970),[1] and with monopolizing and attempting to monopolize, in violation of section 2 of that Act.[2] To prevail, Travelers had also to establish that either Blue Cross' conduct did not come within the protective umbrella provided by the language of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011, et seq. (1970),[3] or was excluded from the protection of that Act by the presence of boycott, coercion, or intimidation, see 15

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1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . ."

2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor . . . ."

3. § 1012(b) provides:

". . . the Sherman Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

U.S.C. §1013(b) (1970).[4] After a lengthy non-jury trial, the district court concluded that Blue Cross' conduct was immunized by the McCarran-Ferguson Act and that, even absent such protection, the conduct did not violate the antitrust laws. See *Travelers Ins. Co. v. Blue Cross of Western Penna.*, — F. Supp. — (W.D. Pa. 1972) (1972 Trade Cas. ¶ 73,311, at 91,428).[5] We agree with the district court on both points.

The relevant market consists of 29 counties in Western Pennsylvania. Blue Cross provides hospitalization insurance for 51% of the population of this area; and during a relevant period Blue Cross accounted for 62% of all the patient days which were covered by commercial insurance.[6]

Travelers objects to a standard contract which Blue Cross has with 101 hospitals in this area which prescribes the amounts and terms under which Blue Cross pays for the services rendered its subscribers. Blue Cross reimburses hospitals only for audited costs subject to a ceiling;[7] and these costs do not include any

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4. "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or any act of boycott, coercion, or intimidation."

5. The findings in this opinion are not clearly erroneous. See F.R. Civ. P. 52. Earlier district court opinions in this case are *Travelers Ins. Co. v. Blue Cross of Western Penn.*, 306 F. Supp. 219 (W.D. Pa. 1969), and *Travelers Ins. Co. v. Blue Cross of Western Penn.*, 298 F. Supp. 1109 (W.D. Pa. 1969).

6. There were also patients who qualified for Medicare or Medicaid, etc., or who were not covered by any form of reimbursement for hospital or medical costs.

7. This ceiling varies for each of nine categories of hospitals.

portion of the general hospital expenses of capital construction, of providing free services to indigents, and of providing service to patients who default. Because of these limitations, Blue Cross pays some 14-15% less than the amounts that non-Blue Cross patients are charged.[8] Consequently, Blue Cross quotes rates for hospitalization insurance correspondingly lower than the rates of private insurance companies such as Travelers.

Whether the McCarran-Ferguson Act exempts Blue Cross' arrangement with these hospitals from antitrust scrutiny depends, first, on the scope of the statutory term "business of insurance," second, on the extent of state regulation of this arrangement, and third, on the presence or absence of boycott, coercion or intimidation.

The Supreme Court's most recent interpretation of the McCarran-Ferguson Act appears in *SEC v. National Securities, Inc.*, 393 U.S. 453, 457-61 (1969), where the Court held that a state insurance department's approval of a merger of insurance companies would not exempt the merger from the federal securities laws. The Court reasoned that regulation of the "business of insurance" meant control over the relationship between the insurance company and its policyholders; the term did not encompass regulation of the relationship between the

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8. The district court opinion makes clear that the volume of Blue Cross subscribers and its cooperative coverage of many poor risk subscribers (such subsidization amounted to $27,000,000. in the years 1960-1970; 700a-701a) are important factors in its ability to negotiate favorable contracts with the hospitals, subject to the approval of the State Insurance Department, see 40 P.S. § 1404.

company and its shareholders. However, although the Court fashioned this dichotomy, it did not fix the exact contours of the term "business of insurance." Rather, it indicated activities clearly covered — fixing rates, selling and advertising policies, licensing companies and agents, prescribing the types of permissible policies, etc — and suggested the possibility of additional ones, using this language:

> "Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class." 393 U.S. at 460.

Two district court cases which pre-dated *SEC v. National Securities, Inc.*, nevertheless are useful for com parison with the present case. In *California League of Independent Insurance Producers v. Aetna Casualty & Surety Co.*, 175 F. Supp. 857, 860 (N.D. Cal. 1959), the "business of insurance" was held to include the size of commissions paid by companies to agents, because commissions were a vital factor in the companies' ratemaking structure. In contrast, the district court in *Hill v. National Auto Glass Co.*, 293 F. Supp. 295 (N.D. Cal. 1968), held that the McCarran-Ferguson Act would not protect Allstate, an automobile liability insurer, which allegedly secured installation jobs for selected automobile glass dealers. It can be surmised that the impact on Allstate's rates of the expense of replacing automobile glass, while it might be direct, would not be substantial.

In the present case, the district court found that the interrelationship of hospital payments and subscribers' rates was such that Blue Cross' arrangement with hospitals should be considered part of the "business of insur-

ance." This conclusion is a sound construction of the law and is amply supported by the evidence.[9]

Also, the evidence supports the district court finding that the state regulates the arrangement here in question. Section 4 of the Nonprofit Hospital Plan Act, Penn. Stat. Ann. tit. 40, § 1404, provides that:

> "The rates charged to subscribers by nonprofit corporations, . . . all rates of payments to hospitals made by such corporations pursuant to the contracts provided for in this act, . . .and any and all contracts entered into by any such corporation with any hospital, shall, at all times, be subject to the prior approval of the Insurance Department."[10]

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9. One witness, Herbert S. Denenberg, the present Insurance Commissioner, testified as follows at App. 766a:

> "Q. Commissioner, in carrying out the responsibilities of your office as you see them, what relation, if any, have you found to exist between a Blue Cross plan reimbursement contract with its hospitals and the Blue Cross plan subscriber rates?
>
> "A. Well, these two things are really indivisible aspects reflecting the same economic forces. If you do not have a sound contract between Blue Cross and the hospitals that controls cost and quality then the Blue Cross rate to the subscriber is going to be unreasonable. So these are typically approached together.
>
> "Both at the hearings and in our adjudication we made it crystal clear that we think that these two items, the contract with the hospitals and the rates to the subscribers are part of the same package and we have to regulate both of them together or that we cannot provide health delivery to the public at the most reasonable cost possible."

10. We reject Travelers' argument that, to exempt conduct from the federal antitrust laws, state regulation

One recent case suggests that the mere existence of such a scheme of regulation, even if ineffective and unenforced, is sufficient to invoke the McCarran-Ferguson Act. *Ohio AFL-CIO v. Insurance Rating Board*, 451 F.2d 1178 (6th Cir. 1971), *cert. denied*, 409 U.S. 917 (1972). However that may be, the record here shows aggressive state regulation.[11] In fact, as the district court found, the features of the contract which Travelers finds objectionable were mandated by Insurance Department guidelines designed to encourage high quality care at reasonable cost. Auditing hospital costs and establishing a ceiling were thought to help hold down rising hospital costs by forcing administrative efficiency. Blue Cross was not to contribute to the care of indigents because this responsibility belonged to the state, not to the subscribers of Blue Cross. Finally, Blue Cross was not to support hospital construction for two reasons: such construction was usually financed by the state, the federal government, or private philanthropy; and, historically, hospitals serving the same area have needlessly duplicated expensive specialized services.

By its terms the McCarran-Ferguson Act does not protect "boycott, coercion, or intimidation." Travelers

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must parallel the Sherman Act. Had Congress desired this type of regulation, it could simply have continued the applicability to insurance companies of the Sherman Act itself. Moreover, that Congress intended to allow the states to regulate insurance on the basis of factors other than competition is conclusively demonstrated by the McCarran-Ferguson Act's immunization of rate-fixing.

11. See App. 761a-780a (testimony of Herbert S. Denenberg); App. 659a-684a (testimony of Francis R. Smith).

has not challenged the finding of the district court that Blue Cross at no time tried to influence the relationship between hospitals and other insurance companies. Instead, Travelers asserts that Blue Cross used "coercion" to extract concessions from the hospitals. The district court held, and we agree with its conclusion, that the economic inducements which made the Blue Cross contract acceptable to hospitals[12] did not amount to "coercion." Especially is that true where, as here, the hospitals negotiated jointly and the resulting contract was approved by the Insurance Department.

Even if the McCarran-Ferguson Act were inapplicable and Blue Cross was subject to antitrust scrutiny, we agree with the district court that Blue Cross could withstand such scrutiny. In arriving at this result, we have not reached the determination of whether Blue Cross possesses enough market power to have "monopoly power." Even assuming that such power exists, we have concluded that Blue Cross' arrangement with hospitals neither illegally restrains trade in violation of section 1 of the Sherman Act nor constitutes, in violation of section 2, "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

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12. If a hospital refused to agree to the contract, Blue Cross would reimburse the hospital on a per diem basis by an amount insufficient to cover the hospital's costs. A hospital would have to make up any deficiency by charging the patient directly. We note that this procedure is typical of the indemnification plans offered by private insurance companies.

Our section 1 analysis begins with the recognition that the situation here does not involve a vertical restraint which has achieved garden variety status. That is, it is not a tie-in, an exclusive dealing arrangement, etc. Consequently, as the district court indicated, it must be carefully looked at on its own facts, in order to reveal whether any restraint of trade it causes is "reasonable." *See Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 4-5 (1958); *cf. Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918).

In its negotiating with hospitals, Blue Cross has done no more than conduct its business as every rational enterprise does, i.e., get the best deal possible. This pressure encourages hospitals to keep their costs down; and, for its own competitive advantage, Blue Cross passes along the saving thus realized to consumers. To be sure, Blue Cross' initiative makes life harder for commercial competitors such as Travelers. The antitrust laws, however, protect competition, not competitors; and stiff competition is encouraged, not condemned. It must be pointed out that the size of its competitors does not give Blue Cross the freedom to conduct other than fair competition for business. The dependence of the community on health facilities requires that anti-competitive practices not be tolerated.

We note that one case, *United States v. New York Great A. & P. Tea Co.,* 173 F.2d 79 (7th Cir. 1949), seems to hold that it violates the Sherman Act for a seller to force suppliers to lower their prices to him. The *A. & P.* case, though, is distinguishable both as to the practices involved and as to the business context of these practices. In addition to its aggressive bargaining over price, A. & P. was also found to exert pressure on

suppliers either not to deal or to alter their dealings with A. & P.'s competitors. No comparable conduct was shown here. In fact, the evidence does not support the proposition that Travelers or other companies could not have achieved some price reductions.[13] Moreover, A. & P. was found to have engaged on several occasions in predatory pricing—selling at retail below its wholesale cost in order to drive competing retailers out of business. This predatory conduct would have been particularly serious due to the small size of many independent grocers: once forced out of business they would be unable to re-enter the market. Here, in contrast, there was no evidence of predatory pricing. Furthermore, there is no reason to suppose that, even if commercial insurers such as Travelers were currently unable to compete with Blue Cross, they could not immediately re-enter the hospitalization insurance business if it became profitable to do so.

In regard to the Sherman Act §2 question, we agree with the district court's determination that Blue Cross achieved its present status in a permissible manner. It was first suggested in *United States v. Aluminum Co. of America,* 148 F.2d 416, 429-30 (2d Cir. 1945), that a monopoly may be "thrust upon" a producer "merely

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13. In its brief at 14, Travelers calls our attention to the testimony of various of its witnesses at App. 862a-863a; 890a-891a; 936a-937a; 944a. However, almost all of this evidence suggests not that Travelers was unable to obtain any price reduction from hospitals, but rather that Travelers assumed its inability to do so and, therefore, did not press the matter, Moreover, it is not clear that Travelers was willing to adopt a full-cost reimbursement scheme comparable to that of Blue Cross (as opposed to the typical indemnification arrangement) as a quid pro quo.

by virtue of his superior skill, foresight and industry," and that such a result would not be violative of section 2.[14] In *United States v. Grinnell Corp.*, quoted above, the Supreme Court reaffirmed this position. The district court found, on ample evidence, that Blue Cross owes its success to the completeness of its coverage. From the time of its organization in the late 1930s, Blue Cross has reimbursed hospitals for all covered services rendered its subscribers. Private companies, on the other hand, have, until relatively recently, provided only that their policyholders would be indemnified up to a set dollar ceiling.[15] Blue Cross thus has exposed itself to considerably greater risk because of the possibility that treatment would be extensive and because of the probability that hospital costs would rise. By shouldering the risk, Blue Cross has made itself considerably more attractive to consumers. The antitrust laws were not intended to condemn such conduct.

One final contention of Travelers may be disposed of quickly. Travelers now argues that if Pennsylvania grants a competitive advantage to Blue Cross via the operation of the McCarran-Ferguson Act, Pennsylvania denies Travelers equal protection of the laws. Travelers concedes that it did not present this argument to the district court until, after the lengthy trial, Travelers submitted a list of requested findings of fact and con-

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14. If this would be true for a monopolist, it would apply even more strongly to the present situation in which Blue Cross clearly does not have a monopoly.

15. The commercial companies are now willing to write complete coverage for at least large-group plans. It appears that Blue Cross is still alone in offering this arrangement to small groups and to high-risk individuals.

clusions of law. It is questionable whether such belated presentation properly raised the issue before the district court so as to make consideration here proper. *See Andrews v. Chemical Carriers, Inc.*, 457 F.2d 636 (3d Cir. 1972). In any event, the argument has little merit. In view of our holding that, independent of the McCarran-Ferguson Act, the antitrust laws were not violated, the state of Pennsylvania has not denied Travelers equal treatment in violation of the Fourteenth Amendment. Furthermore, even if McCarran-Ferguson Act protection were necessary to Blue Cross, the facts do not support the proposition that Pennsylvania's regulation of the contract between Blue Cross and the hospitals was without rational purpose, *see, e.g. James v. Strange*, 407 U.S. 128 (1972).

The judgment of the District court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B.

Final Opinion of the United States District Court for the Western District of Pennsylvania

(Filed January 6, 1972.)

The Travelers Insurance Company (Travelers), a corporation engaged in the business of general or "all lines of" insurance for profit, invoking Sections 1 and 2 of the Sherman Anti-Trust Act*, seeks relief from the effects of certain practices on the part of Blue Cross of Western Pennsylvania (Blue Cross), a non-profit corporation engaged exclusively in that phase of the insurance business which deals with the guaranteeing of payment for hospital care. It is stipulated that the business of both Travelers and Blue Cross affects interstate commerce and that this court has jurisdiction over the parties and the subject matter.

The record, which includes the transcript of a comprehensive non-jury trial held before the undersigned, reveals that Blue Cross subscribers and their covered dependents number more than half the population of the relevant market area—namely, twenty-nine counties in Western Pennsylvania—and that during the period 1965-1969, they were the recipients of 62% of all hos-

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*1. 15 U. S. C. A. Sec. 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or wit foreign nations, is declared to be illegal. . . ."

2. 15 U. S. C. A. Sec. 2: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a misdemeanor. . . ."

pital days of service to Western Pennsylvania patients covered by hospitalization insurance. Hospitals accept from Blue Cross in full payment for their services to Blue Cross subscribers their audited costs of service to Blue Cross subscribers as a unit, under the terms of a standard form of contract between Blue Cross and 101 hospitals in and about the relevant market area. In order to cover their fundamental requirements not incurred by reason of services to Blue Cross subscribers —such as the cost of services to indigent and defaulting patients—the same hospitals charge policyholders of Travelers and other commercial carriers an average of 14% more for their services than they accept as full payment from Blue Cross. Travelers' "cost of claims", therefore, for the same hospital services is 14% higher than that of Blue Cross. Inasmuch as the cost of claims of both Travelers and Blue Cross accounts for 90% or more of their income from subscribers or policy-holders, as the case may be, the 14% differential subjects Travelers to a substantial price disadvantage in its quest for hospitalization insurance business. It is also to be noted that Blue Cross' promotional activities, prior to the filing of the instant action, featured the ability of its subscribers to acquire hospital services at rates lower than those charged by hospitals to their other patients and, further, that those hospitals which do not enter into the Blue Cross contracts are paid a per diem rate for their services to Blue Cross subscribers which is substantially less than their costs of service. Hence, Travelers presents Blue Cross as a dominant competitor monopolizing hospital insurance coverage by inducing the providers of hospital service into a discriminatory arrangement in favor of Blue Cross subscribers and

against the commercial insurance carrier's policyholders.

On the other hand, the activities of Blue Cross in all respects material to this case, including the terms of the contract under attack, are regulated and directed by the Insurance Department of the Commonwealth of Pennsylvania in strict conformity with the provisions of the Non-profit Hospital Plan Act of 1937, 40 P.S. § 1401 *et seq.*, enacted by the Pennsylvania General Assembly to meet a public health problem described in "The Middle Road", a study report of the Pennsylvania Economy League, as follows:

> "In the early 1930's, when the United States experienced one of its worst economic depressions, hospital financing in Western Pennsylvania, as in the country in general, was in difficulty. Voluntary hospitals were under-financed, and it was common for people to forego needed hospitalization because they lacked money to pay the bills. Forced economies resulted in the discontinuance of some hospital services and retarded development in other services.
>
> * * *
>
> As a result, the community of Western Pennsylvania as a whole was not receiving adequate hospital care even by the standards of those days."

In the words of The Honorable Herbert B. Cohen, Majority Leader of the Pennsylvania House of Representatives, and sponsor of the aforesaid Act:

> "5. The Legislature of Pennsylvania in approving this law was attempting to meet a severe need of providing citizens of Pennsylvania with Hospital

care at a cost within their means and also of providing hospitals with a source of financial support which would place them in a more stable financial position and thereby less dependent upon state and local tax funds. The Legislature therefore was attempting to fill a gap created by commercial insurance companies' underwriting policies which left the mass of Pennsylvania citizens unprotected from hospitalization expenses and hospital bills in many instances unpaid. It proceeded to close this gap by authorizing the creation of non-profit hospital plans, now known as Blue Cross plans, which through contracts with hospitals would provide hospital services for subscribers and guarantee the payment of their hospital care."

Under the terms of the said Act, Blue Cross, having been previously organized under the Pennsylvania Nonprofit Corporation Law, approved May 5, 1933, P. L. 289, for the purpose of establishing, maintaining and operating such a non-profit hospital plan became subject to regulation by the Pennsylvania Insurance Department in the following respects: "the rates charged to subscribers . . ., all rates of payments to hospitals . . ., all acquisition costs in connection with the solicitation of subscribers . . ., the reserves to be maintained . . ., the certificates issued representing subscribers' agreements, and any and all contracts entered into with any hospital." (In the same Act, Blue Cross was extended an exemption from taxation and from "all other of the insurance laws of this Commonwealth.") The Blue Cross hospital contract is, therefore, an integral part of Pennsylvania's regulated hospital plan. By reason of the interrelationship of hospital payments and Blue Cross

subscriber rates the contract also falls within the ambit of "insurance business". As stated in *Securities and Exchange Commission v. National Securities, Inc., et al.*, 393 U.S. 453 (1969):

> "The relationship between insurer and insured, the type of policy, which could be issued, its reliability, interpretation, and enforcement—these were the core the 'business of insurance'. . . . Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the 'business of insurance'."

Blue Cross accordingly asserts two defenses—(1) an exemption under the McCarran-Ferguson Insurance Regulation Act and (2) a general denial of any acts which constitute monopolization or restraint of trade within the meaning of the Sherman Act.*

Section 2(b) of the McCarran-Ferguson Insurance Regulation Act, 15 U. S. C. A. § 1012, provides:

> "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, ..."

Since all Blue Cross activities of which Travelers complains occur within the area of state-regulated insurance business, it would appear that, without more, the

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*On Motion for Summary Judgment it has been previously determined that Blue Cross' participation in the Pennsylvania Nonprofit Hospital Plan does not extend to it the Sherman Act exemption generally applied to the governmental actions of a state. *Travelers Ins. Co. v. Blue Cross of Western Penn.*, 298 F. Supp. 1109 (W.D. Pa. 1969).

McCarran exemption should apply. Section 3(b) of the said Act, however, reads as follows:

> "Nothing contained in this chapter shall render . . . the said Sherman Act inapplicable to any . . . act of boycott, coercion, or intimidation."

It was only Travelers' allegations to the effect that the Blue Cross hospital contract was obtained through "boycott, coercion and intimidation", then, which enabled its claim to survive a motion for summary judgment on McCarran-Ferguson grounds. See *Travelers Ins. Co. v. Blue Cross of Western Penn.*, 306 F. Supp. 219 (W.D. Pa. 1969). Travelers, consequently, bears the burden of establishing both an unreasonable restraint of trade under its Sherman Act claim and the accomplishment thereof through "boycott, coercion and intimidation", lest its claim fall under McCarran.

As indicated above, Travelers has localized the source of Blue Cross' dominant competitive position in the discriminatory price advantage emanating from Blue Cross' contracts with hospitals. Its target is the heart of the Blue Cross plan—the hospital contract. The contract itself then, as well as the setting in which it originated, must be tested for unreasonable-restraint-of-trade characteristics and elements of boycott, coercion and intimidation.

The contract in issue, approved by the Pennsylvania Insurance Department on January 11, 1967, was the outgrowth of a constant flow of communication between representatives of the Hospital Council of Western Pennsylvania and the Northwest Association of which the various contracting hospitals are members, on the one hand, and representatives of Blue Cross on the

other. In this forum hospitals were recognized as a community health service, Blue Cross as a community organization through which the members of the public who chose to do so might pre-pay in periodic installments the costs of their hospital care, and the Blue Cross formula of reimbursement to hospitals as a community-wide problem. This forum also had the benefit of the experience of both hospitals and Blue Cross through a series of previous contracts commencing early in the year 1938. The first contract which became effective early in 1938 provided for a flat *per diem* reimbursement which was the same for all hospitals. In January, 1951, a second contract was entered into which provided for hospital payment based upon the audited costs of hospitals. The third contract containing certain refinements of the hospital reimbursement formula based upon audited costs was entered into in 1956. The latter contract remained in effect until the current 1966 contract was approved by the Insurance Commissioner on January 11, 1967. Before any of the contracts mentioned were finalized their terms were thoroughly considered by the Pennsylvania Insurance Department which also conducted exhaustive public hearings on the subject matter. It should also be noted that each revision of the contract and the day-to-day experience of the parties in complying with its terms required occasional requests by Blue Cross for approval by the Pennsylvania Insurance Department of subscriber rate adjustments, some of which were granted, some of which were granted in part only, and some of which were denied *in toto*. In the course of their negotiations it was made abundantly clear to both the hospitals and Blue Cross that in their participation in the Pennsylvania

Nonprofit Hospital Plan certain matters of policy would be inflexible, namely—(1) that hospital reimbursement formulae be based on costs and limited by a ceiling, (2) that the hospital cost of free care be excluded in the application of any reimbursement formula and (3) that the cost of new hospital construction or amounts attributable to capital expansion be excluded from any cost-based reimbursement formula. Within these guidelines numerous proposals were extensively discussed between representatives of the above-mentioned hospital associations and representatives of Blue Cross, as a result of which the parties arrived at a hospital-sponsored amendment to the existing reimbursement formula designed to accommodate the specific financial needs of each of the contracting hospitals according to its own classification within any one of nine categories.* An appeal procedure for those hospitals which might consider themselves aggrieved with respect to reimbursement for service to Blue Cross subscribers was agreed upon and the contract in other respects, as well, reflects the fact that, although the conferees were not in unani-

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*Statement of Herman M. Sommers, Ph. D., one of defendant's expert witnesses:

> "(2) . . . hospitals are grouped into nine categories, based on combinations of geographic location and teaching responsibilities of the hospital. The ceiling for an individual hospital is ten per cent above the weighted average of the *per diem* costs of hospitals within its own group—weighted by the number of patient days at the various institutions in the particular hospital grouping.
>
> * * *
>
> (6) The contract provides for payment of an additional three percent of the hospital's audited cost in lieu of building depreciation."

mous accord on all its provisions, the current Blue Cross contract is the result of exhaustive negotiation carried on with due regard for the mutual needs and responsibilities of the hospitals and Blue Cross as community service institutions participating in the Commonwealth of Pennsylvania's plan for the efficient maintenance of an essential community health service at the lowest possible cost to the public. On this point the testimony of Walter Rome, Administrator of Children's Hospital, Pittsburgh, Pennsylvania, is typical of the attitude of the hospitals toward the existing contract with Blue Cross:

> "I have been in the hospital field, as I said a moment ago, for twenty some years. I can never remember a time in that entire period when hospital administrators either officially or unofficially or formally or informally were not having conversations regarding the last contract with Blue Cross and whether or not the time was ripe to consider new items that might be introduced as part of a new contract.

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*Statement of Herman M. Somers, Ph.D., one of defendant's expert witnesses:

> "(2) . . . hospitals are grouped into nine categories, based on combinations of geographic location and teaching responsibilities of the hospital. The ceiling for an individual hospital is ten per cent above the weighted average of the *per diem* costs of hospitals within its own group—weighted by the number of patient days at the various institutions in the particular hospital grouping.
>
> (6) The contract provides for payment of an additional three percent of the hospital's audited cost in lieu of building depreciation."

You must understand that for the most part inasmuch as hospitals created Blue Cross in the first place, that we look on Blue Cross as the partnership of the hospitals. . ." Tr. 1143-1144.

". . . I remember I was delighted with this contract, because it resulted in something I had been trying to obtain for a long time, and it was my feeling that this was a contract that both the Blue Cross and the hospital could live with and it was in the best interests of the community and of the hospitals and of Blue Cross. . . ." Tr. 1166.

It is apparent that the overriding motive of both contracting parties was the performance, within the outline of Pennsylvania Insurance Department Regulations, of their role in the implementation of a community health service plan on a non-profit basis—a manifestly legitimate purpose pursued in an atmosphere free of coercive tactics on either side. It is also evident that hospitals voluntarily accept the Blue Cross plan for their own economic advantage. The following testimony of Dr. Herman M. Somers is indicative:

"Yes, the contract it seems to have many benefits for hospitals and a considerable balance of benefits over disadvantages. The chief one is the guarantee of payment which was at least one time extremely significant to hospitals, unpaid bills represent a very major chunk of their costs.

They are guaranteed that they will be paid and they are guaranteed that they will be paid costs and since they are, by and large, non-profit institutions costs is all one can reasonably expect and while costs, of course, are not easy to define, and

always subject to disputation and always will be, nonetheless, it is on the basis if costs by a definition that is now generally accepted and very widely used.

And they have the advantage of prompt payment, it is very important financially, I said, and Blue Cross pays currently or concurrently, they often say, with the actual incidence of the costs to the hospital, a matter which is financially advantageous. . ." Tr. 3300.

In this connection, it must also be added that the record pertaining to Blue Cross' contract with hospitals contains no direct evidence of coercion on the part of Blue Cross, or coerced reaction on the part of any hospital, or of any discussion or arrangement between Blue Cross and any hospital which directly or indirectly touches upon the relationship of any hospital with Travelers or other commercial insurance carriers.

The evidence on the whole preponderates in favor of Travelers to the effect that the methods employed and the plan administered by Blue Cross, when compared with the hospitalization insurance product of Travelers and 300 other commercial carriers, do result in a superior competitive position on the part of Blue Cross of Western Pennsylvania in the relevant market area and in the relevant product market—hospitalization insurance coverage, whether on a group basis or an individual basis. But Travelers has not met its burden with respect to the issues of monopolization or restraint of trade through boycott, coercion or intimidation. As stated before, the evidence discloses no activity or agreement having to do with the relationship of hospitals and Travelers, much less any inducement to the

hospitals not to deal with Travelers. The evidence likewise negates the presence of coercion or intimidation on the part of Blue Cross, and Travelers' theory of "inherent coercion" predicated upon the proposition that the hospitals had "no alternative" because of "community pressure" does no more than lend credence to Blue Cross' "thrust upon" defense, which is grounded on the existence of historic accident, superior product, and business acumen as the reasons for its superior competitive position. Community attraction and economic appeal are the antithesis of coercion and intimidation.

Recapitulating, this court has concluded that Blue Cross' competitive status was not acquired by boycott, coercion or intimidation; that whatever share of the hospitalization insurance market Blue Cross enjoys is the result of public acceptance uninfluenced by any artificial restraint-of-trade practices on its part; that Blue Cross is not a monopolist, for it not only lacks control over the rate-making effects normally incident to lawful competition, but is without power to establish its own rates; that Blue Cross, therefore, has not violated the provisions of the Sherman Antitrust Act; and that, in any event, Blue Cross is entitled to the McCarran-Ferguson Act exemption.

Not unmindful of the following alert set forth in 54 Am Jur 2d, *Monopolies, etc.*, § 3, it is deemed appropriate, nevertheless, to enumerate the statements of principle not previously stated which led to these conclusions:

> "Legal researchers should be wary of general language in Sherman Act cases. Each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and the

opinions in the cases must be read in the light of their facts."

54 Am Jur 2d, *supra*, citing *Maple Flooring Mfrs. Assn. v. United States*, 268 U. S. 563 (1925).

The thrust of the Sherman Antitrust Act is the prevention of restraint-of-trade and monopolistic practices which, by unwarranted interference with free competition among the suppliers of products or services, have a tendency to deprive the public of the benefits ordinarily derived from the rivalry of a number of sellers. *United States v. Von's Grocery Co.*, 384 U. S. 270, 275 (1966); *Standard Oil Co. v. United States*, 221 U. S. 1 (1911); *United States v. E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (1956); *American Medical Assn. v. United States*, 317 U. S. 519 (1943).

"The purpose of preventing undue restraint of trade is to prevent unreasonably high prices to the purchasers and users of the articles traded in." *United States v. Int. Harvester Co.*, 274 U. S. 693, 701 (1927).

"In applying remedies for this purpose, however, the fact must not be overlooked that *injury to the public* by the prevention of an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute (Sherman Act) rest. . . ." [Emphasis and parenthesis added]. *Standard Oil Co. v. United States, supra*, p. 78.

Although the possession of a large portion of the relevant market may be a factor in determining the existence of a monopoly, bigness alone does not constitute proscribed monopoly power, and where activities are predominantly motivated by legitimate business aims or where monopoly power is acquired through nor-

mal growth and development, as a consequence of having a superior product or business acumen, or through historical accident, the Sherman Act is not offended. *Kansas City Star Co. v. United States,* 240 F. 2d 643, 658 (8 Cir.), cert. denied, 354 U. S. 923 (1957); *Times-Picayune Pub. Co. v. United States,* 345 U. S. 594 (1953); *United States v. Aluminum Co. of America,* 148 F. 2d 416 (2 Cir. 1945).

> "A business organization which has acquired monopoly power is guilty of monopolization if it undertakes a course of action the consequences of which would be to exclude competitors or prevent competition. Proof of a specific intent is not necessary [as it is under 'attempt to monopolize'] . . .
>
> However it cannot be required to forego normal competitive business methods to further legitimate business ends, as distinguished from acts which are done with the intent to create or preserve a monopoly, or which would have the consequence of excluding competitors from a relevant market." *American Football League v. National Football League,* 305 F. Supp. 60, 64 (D. Md. 1962), aff'd. 323 F. 2d 124 (4 Cir. 1963).

Congress in the passage of regulatory statutes such as the Interstate Commerce Act, etc., including the extension of regulatory authority to the states as under the McCarran Act, recognized the fact that the salutary effects of competition may be accomplished by regulation as well.

> "Strict regulation and supervision, particularly with respect to rates charged the public — [is] an effective safeguard against the evils attending mo-

nopoly at which the Sherman Act is directed." *McLean Trucking Co. v. United States,* 321 U. S. 67, 85 (1944).

On the applicability of the McCarran Act, see *Ohio AFL-CIO, et al. v. Insurance Rating Board, et al.,* —— F. 2d —— (6 Cir. Opinion filed Nov. 30, 1971).

Finally, it must be kept in mind that, under all the evidence in this case, the only available judicial remedy for Travelers' plight, the enjoining of Blue Cross activities, would necessarily produce a result inconsistent with the basic and ultimate goal of the federal antitrust laws—consumer protection. The seller's protection is apposite only to the extent that it is not inconsistent with the public's attainment of the highest quality products and services at the lowest possible price.

The previous finding that all challenged Blue Cross activities were conducted in conformity with the Pennsylvania Nonprofit Hospital Plan Act, *supra,* disposes of Travelers' claim based upon alleged violations of the said Act and submitted on the theory of pendent jurisdiction. As to plaintiff's further pendent claim that defendant's alleged acts of boycott, coercion and intimidation violate the Pennsylvania Unfair Insurance Practices Act, 40 P. S. §§ 1151 *et seq.,* the same reasoning applied above in treating plaintiff's identical Sherman Act allegations is dispositive.

An appropriate Order will be entered.

HERBERT P. SORG, *D.J.*

Dated: January 6, 1972.

APPENDIX C

Opinion of the United States District Court for the Western District of Pennsylvania Denying Defendant's First Motion for Summary Judgment

(Filed Jan. 16, 1969)

SORG, District Judge

[1] This Motion for Summary Judgment presents a single issue. Do the activities and transactions of Blue Cross of Western Pennsylvania, a corporation, (hereinafter called "Blue Cross"), constitute state action as opposed to private action so as to exclude them from the proscription by federal law of restraint upon trade or monopolization? As stated in Eastern Railroad Presidents Conference et al. v. Noerr Motor Freight, Inc., et al., 365 U.S. 127, pp. 135-136, 81 S.Ct. 523, p. 528, 5 L.Ed.2d 464:

> "It has been recognized, at least since the landmark decision of this Court in Standard Oil Co. v. United States, 221 U.S. 1, at 51-62, 31 S.Ct. 502, 55 L.Ed. 619, that the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of 'individuals or combinations of individuals or corporations'. Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out. (United States v. Rock Royal Co-op., 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446; Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315). These decisions rest upon the fact that under our form of government the question whether a law of that kind should

pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution."

The plaintiff, Travelers Insurance Company, (hereinafter called "Travelers"), has filed a complaint against Blue Cross seeking relief from its alleged unreasonable restraint of competition among Blue Cross, Travelers, and other health insurance carriers, in violation of Section 1[1] of the Sherman Act, and the alleged attempt by Blue Cross to monopolize the business of providing hospitalization coverage in violation of Section 2[2] of the Sherman Act. It is conceded that the effects of the acts complained of on interstate commerce and the nature of the acts, whether unreasonably restraining competition or monopolistic vel non, are not brought into issue by Blue Cross' Motion for Summary Judgment. Nor does Blue Cross claim exemption as an insurance business under the McCarren Act.[3] It bases it Motion for Summary Judgment exclusively on

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1. 15 U.S.C.A. Sec. 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *."

2. 15 U.S.C.A. Sec. 2: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

3. 15 U.S.C.A. Sec. 1012(b): "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * *."

the theory that its acts constitute valid governmental action by the Commonwealth of Pennsylvania.

Under the terms of the Pennsylvania Non-Profit Hospital Plan Act, 1937, June 21, P.L.1948, Blue Cross, having been previously organized under the Pennsylvania Non-Profit Corporation Law approved May 5, 1933, P.L. 289, for the purpose of establishing, maintaining and operating a non-profit hospital plan became subject to regulation by the Pennsylvania Insurance Department in the following respects: the rates charged to its subscribers; all rates of payments to hospitals; all its acquisition costs in connection with the solicitation of subscribers; the reserves it must maintain; the certificates it may issue representing subscribers' agreements; and any and all contracts it may enter into with any hospital. Any action by Blue Cross in the aforesaid respects without the prior approval of the Insurance Department was and is unlawful, although an appeal to the Court of Common Pleas of Dauphin County from the Insurance Department's refusal of an application for approval is provided for by the Hospital Plan Act. Blue Cross was and is also required to file annual statements with the Insurance Department, and its books and records are subject to examination by that Department. Its dissolution or liquidation is subject both to prior approval by the Insurance Department and to supervision by the Insurance Commissioner. It is also extended an exemption from taxation by the Commonwealth of Pennsylvania and its political subdivisions.

Blue Cross does not dispute that it is a private entity within the scope of the Sherman Act, but contends that, because each and every one of the acts of which plaintiff complains falls within the categories enum-

erated above, and because they were not only approved but directed by the Insurance Department, such acts are the responsibility of the Commonwealth of Pennsylvania and are, therefore, beyond the reach of the Sherman Act. (The transactions complained of consist, in general, of contracts with various hospitals, containing preferential payment schedules, etc., allegedly acquired by Blue Cross as a result of its dominant position in the field of hospital payment plans.)

The gist of Travelers' contentions is that the activities of Blue Cross cannot constitute state action unless the state extends to it an identity within the framework of state government — that if it is to share governmental immunity it must be, in effect, established by the government for a particular governmental purpose; that the state action to be exempted must be specifically authorized by statute; and that the state does not endow a private entity with a governmental attribute by mere regulation or supervision in the public interest.

[2] An analysis of the cases cited by both parties reveals that where a "state action" exclusion from the scope of the Sherman Act has been sanctioned by the courts, a particular pattern emerges from the statute under which such action is taken. Not only does the legislature create the entity involved or endow it with governmental character, but it also directs and authorizes that entity by means of the same statute to utilize anticompetitive means to achieve a specific governmental purpose. For example, in Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), the California legislature not only created prorate raisin districts but authorized them to limit production artificially in order to correct adverse market conditions.

Such behavior, if manifested without government direction, would be contrary to federal antitrust legislation. Similarly, in Allstate Insurance Co. v. Lanier, D. C., 242 F.Supp. 73, 361 F.2d 870 (4 Cir. 1966), a case upon which defendant relies heavily as authority for its motion, the statute not only created the North Carolina Automobile Rate Administrative Office and provided for its regulation by the state insurance commissioner but also expressly authorized price-fixing, an activity proscribed under antitrust laws, in order to protect the people of North Carolina from excessive premiums. In E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1 Cir. 1966), the Massachusetts legislature not only created the Massachusetts Port Authority but also endowed it with certain sovereign powers (such as eminent domain) and enabled the Authority to operate the Boston airport as a monopoly. On the other hand, no case cited by the parties nor discoverable through extensive research reveals any authority ascribing "state action" immunity either to a private entity or to the transactions of a state agency which were not mandated or directed by legislative enactment. That regulation and supervision alone do not constitute a delegation of governmental authority is well established. United States v. Utah Pharmaceutical Association, D.C., 201 F. Supp. 29 (1962); California v. Federal Power Commission, 369 U.S. 482, 82 S.Ct. 901, 8 L.Ed.2d 54 (1962). Further, the Pennsylvania Non-profit Hospital Plan Act is completely silent in matters that have to do with restraint of trade. It is, therefore, deemed appropriate to apply the test suggested in Parker v. Brown, 317 U.S. 341, at p. 352, 63 S.Ct. 307, at p. 314, 87 L.Ed. 315, as follows:

> "* * * It is the state which has created the machinery for establishing the prorate program. * * * The state itself exercises its *legislative authority* in making the regulation and in prescribing the conditions of its application. * * *" [Emphasis Added]

[3] Blue Cross fails to meet the apparent standards inherent in a "state action" exclusion from the scope of the Sherman Act in two respects. It is the creature of individuals — not the state — and it has not been extended valid governmental authority to engage in monopolistic practices.

Although Travelers has indicated a factual dispute concerning Blue Cross' assertion that the insurance commissioner directed or approved all the activities about which Travelers complains, this issue is deemed immaterial, and the Motion for Summary Judgment will be denied on the basis of those facts that are not in dispute.

An appropriate order will be entered.

APPENDIX D

Opinion of the United States District Court for the Western District of Pennsylvania Denying Defendant's Second Motion for Summary Judgment

(Filed November 10, 1969)

SORG, District Judge.

It having been determined on defendant Blue Cross' previous Motion for Summary Judgment that it is not immune as a state agency from the provisions of the Federal Anti-Trust Laws, Blue Cross has filed a second Motion for Summary Judgment claiming the exemption extended by the McCarran Act, infra, to those engaged in the business of insurance.

Blue Cross does compete with other insurance carriers in the field of hospitalization coverage and its practices in all respects concerning which plaintiff Travelers complains are regulated by the Insurance Commissioner of Pennsylvania, as is more fully set forth in this court's memorandum filed on January 16, 1969, in connection with defendant's first Motion for Summary Judgment, D.C., 298 F.Supp. 1109. Travelers asserts, however, that the practices complained of, whether regulated and approved by the Pennsylvania Insurance Commissioner or not, are specifically excepted from the McCarran Act exemption in that they affect competition through "boycott, coercion and intimidation."

Section 2(b) of the McCarran-Ferguson Insurance Regulation Act, 15 U.S.C.A. § 1012, provides: "No Act of Congress shall be construed to invalidate, impair, or

supersede any law enacted by any State for the purpose of regulating the business of insurance, * * *." Section 3(b) of the same Act, 15 U.S.C.A. § 1013, however, declares: "Nothing contained in this chapter shall render * * * the said Sherman Act inapplicable to any * * * act of boycott, coercion, or intimidation."

[1, 2] Travelers alleges that Blue Cross, exercising the competitive advantage of one writing over seventy percent of the hospitalization coverage in Western Pennsylvania, exacts from reluctant hospitals an agreement to accept payment for hospital services to its subscribers in amounts less than the charges made to non-subscribers of Blue Cross. Travelers alleges that such discounts are obtained by intimidation on the part of Blue Cross—that a refusal to pay for hospital services to its subscribers by one who dominates the field of hospital benefit plans, except on discriminatory terms, constitutes an act of "boycott, coercion and intimidation." Blue Cross counters that its acts are unassailable because they are mandated by the Insurance Commissioner of Pennsylvania. The doctrine enunciated in Weiner v. Hospital Service Plan, 13 Pa. Dist. & Co. R.2d 689, aff'd. per curiam in 187 Pa. Super. 244, 144 A.2d 575, however, to the effect that a statute requiring prior approval by a state insurance department of a non-profit hospitalization plan does not authorize the department to grant a monopoly to any one such corporation, compels the corollary that the department cannot thereby validate monopolistic practices by any one corporation. That all insurance industry acts of boycott, coercion, or intimidation condemned by the Sherman Act are subject to federal law is also clearly established in Monarch Life Insurance Company v. Loyal Protective Life Insur-

ance Company, 326 F.2d 841 (2 Cir. 1963), cert. den. 376 U.S. 952, 84 S.Ct. 968, 11 L.Ed 2d 971.

[3] Travelers has, therefore, raised substantial factual issues concerning the competitive position and the competitive practices of Blue Cross in the insurance industry, which preclude the ascribing of McCarran Act immunity to the defendant on the present state of the record.

It is ordered that the defendant's Motion for Summary Judgment be and the same is hereby denied.

It is further ordered that on or before December 1, 1969, the parties submit a proposed pretrial order to be entered in lieu of that which was entered on April 30, 1969.